Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324
(Counsel of Record)

97 pp

QUESTIONS PRESENTED

1. Where an accused presents substantial corroborated testimony that he was denied his constitutional right to testify at his criminal trial, may a waiver of the right to testify be found where the trial court record contains no evidence of waiver?

2. Whether "waiver" of the constitutional right to testify is a question of law subject to de novo review?

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OPINIONS BELOW

The Magistrate Judge's unpublished opinion recommending relief be granted is attached as Appendix A. The first opinion of the District Judge denying relief is attached as Appendix B. The first Court of Appeal's opinion, reversing the District Judge is attached as Appendix C, and

reported at 34 F. 3d 310. The Order to hear the case en banc is attached as Appendix D, and reported at 42 F. 3d 310 (5th Cir. 1994). The Order vacating the first Court of Appeal's opinion is attached as Appendix E. The Order remanding back to District Court is attached as Appendix F, and is reported at 53 F. 3d 94. The District Court's unpublished opinion denying relief is attached as Appendix G. The Court of Appeal's unpublished opinion affirming denial of relief is attached as Appendix H.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 3, 1996 through Writ of Certiorari under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution, Amendment Fourteen which says:

> Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

John S. Jordan filed his Petition for Writ of Habeas Corpus in the United States District Court for the Northern District Court of Mississippi alleging he was unconstitutionally convicted of rape in the Oktibbeha County, Mississippi Circuit Court. R., Vol. I, pp. 1-2. The Petition alleges the denial of the constitutional right to testify. R., Vol. I, pp. 4-5.

Following an evidentiary hearing, at which Jordan's lead trial attorney (Steighner) did not appear, the Magistrate Judge determined, based upon the uncontradicted testimony at the hearing, that Jordan was denied his constitutional right to testify at his criminal trial. Appendix A.

On October 1, 1993, without any evidentiary hearing, the United States District Court Judge overruled the magistrate judge, finding that Jordan had waived his right to testify. Appendix B.

Jordan appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed, holding that the district court had no authority to overrule the magistrate judge's factual findings without an evidentiary hearing. Jordan v. Hargett, 34 F. 3d 310 (5th Cir. 1994); Appendix C.

A majority of the Fifth Circuit voted, however, to rehear the case en banc. 42 F. 3d 310; Appendix D. In a letter attached to its en banc brief, the Attorney General stated that Jordan's trial attorney (Steighner), had been located and he would testify that Jordan had validly waived his constitutional right to testify at his criminal trial. Therefore, the United States Court of Appeals remanded the case to the District Court for further hearing. Appendix E. The case was remanded to the same district judge who had already determined, without any hearing, that Jordan had waived his right to testify. R., Vol. II, pp. 265-70.

At the remanded hearing, Steighner, Jordan's lead counsel at his criminal trial, swore that he decided not to call Jordan as a witness at the rape trial for strategic reasons, R., Vol. III, p. 54, and that Jordan "understood and concurred in the decision . . . not to testify." R., Vol. III, p. 61. Attorney Steighner, whose license to practice law has since been suspended, was the only witness who testified that Jordan had waived his right to testify. On the other hand, Jordan's co-counsel, Rufus Ward, swore that Jordan had repeatedly requested to testify, R., Vol. III, pp. 17-18. Jordan's wife of forty-one years, and daughter, both swore that Jordan kept

requesting to testify, but the requests were ignored by Steighner. R., Vol. II, p. 226, Vol. III, pp. 37-39, 43. Jordan, himself, swore he had repeatedly asked to testify, and that his testimony was crucial, since only he could testify that he had had a vasectomy, and, therefore, could not have left the sperm that was left by the rapist. R., Vol. III, p. 23. Steighner's claim that it was in Jordan's strategic interest not to testify was contradicted by the fact that he had filed a motion in a related civil case stating that a failure to testify in the civil rape case would cause the defense to be "severely hampered." Petitioner's Exhibit 5, ¶ 4 at evidentiary hearing.

Despite the fact that Attorney Steighner's testimony was substantially impeached, and despite the fact that it was contradicted both by his co-counsel, and by members of Jordan's family, the district court found, from Steighner's testimony, that Jordan had waived his constitutional right to testify, or had, at least, acquiesced in Steighner's advice not to testify. R., Vol. II, pp. 302-308. The district judge had already determined, before the first appeal to the Fifth Circuit, that Jordan had waived his constitutional right to testify even without hearing any testimony so stating. Appendix B. Thus, the finding, after an evidentiary hearing,

that Jordan had waived his constitutional right to testify was practically inevitable.

The United States Court of Appeals for the Fifth Circuit rejected Jordan's argument that the question of waiver of the constitutional right to testify was a question of law, subject to de novo review. Instead, it determined that the district court judge's finding that Jordan had waived his right to testify was a factual finding, and "because Steighner's testimony was not unbelievable, we conclude that the District Court has not clearly erred in finding that Jordan accepted his attorney's recommendation that he not testify." Appendix H, p. 2.

Jordan now asks this Court to hear the case for two reasons:

1. This Court's precedents indicate that waiver of constitutional rights at a criminal trial cannot be established absent a demonstration of waiver on the trial court record; and

2. The Fifth Circuit has ignored this Court's precedent holding that a question of waiver of the constitutional rights is a question of law, and subject to de novo review.

ARGUMENT I

WHERE SUBSTANTIAL EVIDENCE INDICATES THAT THE CONSTITUTIONAL RIGHT TO TESTIFY WAS VIOLATED, A FINDING OF "WAIVER" OF THE CONSTITUTIONAL RIGHT TO TESTIFY IS PRECLUDED UNLESS THE TRIAL COURT RECORD DEMONSTRATES THE ACCUSED WAIVED HIS RIGHT TO TESTIFY.

One accused of a crime has the constitutional right to testify in his own behalf. Rock v. Arkansas, 483 U.S. 44; Faretta v. California, 422 U.S. 806. The question presented here is the proof necessary to demonstrate a waiver of the constitutional right to testify. The District Court and Court of Appeals found waiver, despite the fact that the only witness (Steighner), who claimed Jordan had waived the right to testify, was of doubtful credibility. It found waiver, despite the fact that Jordan, several family members, and Steighner's co-counsel had all testified that Jordan did not waive his right to testify.

The fundamental error of the Court of Appeals was its holding that a finding of a "waiver" of constitutional rights may be found from a silent trial court record. This Court has held that presuming waiver of constitutional rights from a

silent trial court record is impermissible. For example, Boykin v. Alabama Co., 395 U.S. 238, 89 S.Ct. at 1713 (1969) held:

> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation . . .
> We cannot presume a waiver of . . . important federal rights from a silent record . . .

Boykin, 89 S. Ct. at 1713.

Johnson v. Zerbst, 304 U.S. 464 (1938) observed:

> Whether there is a proper waiver (of the right to counsel) should be clearly determined by the trial court and . . . that determination (should) appear upon the record.

Accord, as to waiver of constitutional rights involved in a guilty plea, Adams v. United States Ex Rel McCann, 317 U.S. 269, 63 S. Ct. 236 (1942).

The Court of Appeals' holding that a waiver by the accused of the right to testify need not appear on the trial court record, but may simply be demonstrated by contradicted, impeached testimony given at a post trial hearing years later, is inconsistent with that same court's holding that waivers of other constitutional rights must appear on the trial court record. Thierot v. Whitley, 18 F. 3d 311 (5th Cir. 1994) (Trial court record must show accused

understood elements of offense); United States v. Howard, 991 F.2d 195 (5th Cir. 1993) (Trial court record must demonstrate guilty plea was knowingly and voluntarily enteres); Alexander v. Whitley, 940 F.2d 946 (5th Cir. 1991) (Guilty plea is not valid unless trial court record demonstrates waiver was voluntarily and intelligently entered).

Waiver of constitutional right to testify, like the other constitutional rights just mentioned, is too crucial to be presumed from a silent trial court record. See, O'Neil Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-The-Record Waiver, 51 U.L.Rev. 89 (1990). Indeed, requiring an on-the-record waiver is the only reliable method of determining whether the accused waived the right to testify. The usual witness claiming a waiver will be defense counsel. No lawyer is apt to admit he allowed his client's constitutional right to testify to be violated, but under the Fifth Circuit's view, such an admission would be required to prove waiver. Thus, if no on-the-record waiver of the right to testify is required, there is no practical method of ever proving the right to testify was violated. This demeans the crucial importance of the

constitutional right to testify. As put by Judge Godbold:

> In the narrow world of the courtroom, the defendant may have faith, even if mistaken, in his own ability to persuasively tell his story to the jury. He may desire to face his accusers and the jury, state his position, and submit to examination. His interest may extend beyond content to the hope that he will have a personalized impact on the jury or gain advantage from having taken the stand, rather than to seek the shelter of the Fifth Amendment or without regard to his impact upon the jury, his desire to tell "his side" in a public forum may be of overriding importance to him. Indeed, in some circumstances, the defendant, without regard to the risk, may wish to speak from the stand over the head of judge and jury to a larger audience. It is not for his attorney to muzzle him.

Wright v. Estelle, 572 F. 2d at 1078.

In short, the chief reason this Court should grant the Writ is that this Court's previous holdings compel a finding that the trial court record must demonstrate waiver of the right to testify. However, another important reason for granting the Writ is to reconcile the differing opinions from the lower courts. For example, the Seventh Circuit indulges a presumption from a silent record that the Defendant waived his right to testify. United States v. Joelson, 7 F. 3d 174 (9th Cir. 1993). The Eleventh Circuit holds that the right to testify has been infringed only if his proof is adequate to

demonstrate that defense counsel was constitutionally inadequate, thus merging the right to testify with the right to competent counsel. United States v. Teague, 953 F.2d 625, 121 L.Ed.2d 82 (11th Cir. 1992); cert. denied 121 L.Ed.2d 82 (1992). On the other hand, several state supreme courts hold that waiver of right to testify can be demonstrated only if the trial court record shows a voluntary waiver. Board v. United States, 586 A.2d 670; Hughes v. State, 513 P.2d 111 (Ala. 1973); People v. Curtis, 681 P.2d 504 (Col. 1984); Culberson v. State, 412 So.2d 1184 (Miss. 1982).

The proper holding is that where an accused makes a substantial evidentiary showing that he did not waive his constitutional right to testify, an on-the-record waiver in the trial court record is necessary to demonstrate that the constitutional right to testify was voluntarily relinquished. Any other standard is inconsistent with this Court's teaching that lower courts are to "indulge every reasonable presumption against waiver of constitutional rights," Brewer v. Williams, 430 U.S. 387 (1977), and is inconsistent with this Court's holding that the waiver of constitutional rights must appear on the trial court record. Boykin v. Alabama, supra; Johnson v. Zerbst, supra.

ARGUMENT II

THE COURT SHOULD GRANT THE WRIT AND REVERSE THE JUDGMENT OF THE FIFTH CIRCUIT BECAUSE THE FIFTH CIRCUIT FAILED TO FOLLOW THIS COURT'S TEACHING THAT THE QUESTION OF "WAIVER" OF CONSTITUTIONAL RIGHTS IS A QUESTION OF LAW WHICH MUST BE REVIEWED DE NOVO.

Brewer v. Williams, 430 US. 387 (1977) held that whether one has waived constitutional rights is a question of law. Nevertheless, the United States Court of Appeals for the Fifth Circuit considered the question to be one of fact. It held that since the District Court credited Steighner's testimony, the Appeals Court could grant no relief. Appendix H, p. 2. The Seventh Circuit and Ninth Circuit also disregard Brewer and hold that questions of waiver of constitutional rights are questions of fact. Jalowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989); United States v. Johnson, 820 F.2d 1065, 1074 (9th Cir. 1987). The Writ should be granted to correct these courts in their refusal to follow this Court's teaching in Brewer v. Williams that a waiver of constitutional rights is a question of law which must be given de novo appellate review.

Respectfully submitted,

WAIDE LAW OFFICE

By: /s/
Jim Waide
MS Bar No.: 6857

WAIDE LAW OFFICE
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MS 38802
601-842-7324
(Counsel of Record)

Attorneys for Petitioner

No.

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APPENDIX A

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHN S. JORDAN,

Petitioner

v. No. EC 91-130-S-D

STEVE PUCKETT, ET AL

Respondents

REPORT AND RECOMMENDATION

This cause comes before the court on the petition of John S. Jordan for a writ of habeas corpus pursuant to 28 U.S.C. §2254. In February, 1987, Jordan was convicted of rape in the Oktibbeha County Circuit Court and sentenced to serve a term of 14 years in the custody of the Mississippi Department of Corrections. He is presently incarcerated in the Mississippi State Penitentiary at Parchman. He has exhausted his available state remedies and now seeks review in this court. The petitioner cites as error: (1) he received ineffective assistance of counsel at trial and (2) he was denied his right to testify in his own behalf at trial.[1]

[1] Jordan originally included several other claims in his habeas corpus petition but

The undersigned conducted an evidentiary hearing in this cause at which the petitioner testified.[2] Jordan testified that he is a retired United States Air Force officer currently incarcerated in the state penitentiary as the result of a rape conviction. (EH 3). He stated that his lead trial attorney was Don Steighner and that he did discuss the case with Mr. Steighner for approximately thirty minutes at the Oktibbeha County Jail two nights before the trial. (EH 3,4). Jordan stated that he did not testify at trial. (EH 3). The petitioner said that they discussed what witnesses would testify but did not discuss if Jordan would testify. He (Jordan) testified that he did tell Mr. Steighner that he wanted to testify. (EH 4). He claimed that they never discussed his testimony or the type of questions that he might be asked. (EH 4). Jordan stated that during each recess he told Mr. Steighner that he wanted to testify so that he could rebut prosecution witnesses' testimony by testifying that he was in Texas visiting relatives at the time the rape occurred. (EH 5). He said that he wanted to testify so that he could have a chance to tell his story and reinforce that he was innocent. (EH 6).

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abandoned all those claims at the evidentiary hearing held. (Evidentiary Hearing (EH) 2).

[2]The petitioner was represented by retained counsel Jim Waide of Tupelo, Mississippi, while the respondents were represented by Special Assistant Attorney General Edward Hatten, Jr.

He said that Mr. Steighner told him that he could not testify because his 1976 conviction for child sexual abuse would be brought out. (EH 6). Jordan stated that he never agreed not to testify and still desired to testify at the end of the trial. (EH 6). He said that he learned that he was not going to testify at the end of the trial. (EH 7). Jordan explained that the rape victim also filed a civil suit against him. (EH 7). He stated that he was found liable by a ten to two jury vote. (EH 7). He said that he did testify at that trial and the rape conviction was brought out at the civil trial several times. (EH 7-8). The 1976 conviction was not mentioned. (EH 8). Jordan further said that he wanted to testify at the rape trial so that he could refute the victim's description of him as the rapist, so that he could point out that the fingerprints taken from the scene were not his, and so that he could show that the jacket taken from his house in 1986 by the sheriff was different from the jacket the victim described the rapist wearing. (EH 9). He said that if he had been allowed to testify that he would have told the jury that he did not own the jacket taken from his house by the sheriff. (EH 9).

On cross-examination, Jordan stated that he had talked with his attorney about his desire to testify two nights before

the trial and at every recess during the trial. (EH 10). He said that he did not know if anyone overheard the conversations. (EH 10). The petitioner said that he explained the issues about which he wanted to testify to Mr. Steighner. (EH 10). He did admit that Mr. Steighner called several other witnesses, including members of his family, who testified about the jacket and the car the petitioner drove to visit his relatives in Texas. (EH 11). He stated that Mr. Steighner told him that if he testified, the 1976 conviction would be brought out. (EH 11). Jordan said that he was never called to the witness stand and that he never advised the trial judge of his desire to testify. (EH 11, 12). He admitted that he had pleaded guilty in 1976 to child molestation and had ben sentenced to serve ten years and pay a $10,000.00 fine. (EH 12). He also said that at the time of the rape trial, there were child sexual abuse charges pending against him in Clay and Jackson Counties which were eventually dismissed. (EH 12-14). Upon inquiry from the undersigned, Jordan stated that Mr. Steighner was aware of those charges which were filed by Jordan's daughter. (EH 15).

Jo Jordan, wife of the petitioner, testified that she was

present during the 1987 rape trial of her husband. (EH 16). She stated that she and her daughter Vicki heard a discussion between Mr. Steighner and John Jordan concerning Jordan's desire to testify in his own behalf. (EH 16). She stated that Mr. Steighner did not want Jordan to testify because the 1976 conviction would be used against him. (EH 17). She said that she overheard Jordan express his desire to testify to Mr. Steighner on several occasions. (EH 17).

On cross-examination, Mrs. Jordan stated that she was present when her husband told Mr. Steighner he wanted to testify. (EH 18). She claimed that Mr. Steighner never responded to Jordan's request, and the family thought that Jordan was going to testify. (EH 18).

Jordan's daughter, Vicki Neilson, testified that she was also present at the 1987 rape trial. (EH 20). She said that she discussed her father testifying with Mr. Steighner. (EH 20). She testified that these discussions occurred in the witness room and outside the courthouse during the lunch break. (EH 20). She stated that she felt her father should have been allowed to testify. (EH 20). Ms. Neilson also said that Mr. Steighner told her that if her father took the witness stand that the 1976 conviction would be used. (EH 21). She

said that Mr. Steighner gave no other reason and never mentioned the pending charges. (EH21). She said that she was present at the civil trial involving her father and that at least two jurors voted to return a verdict for Jordan. (EH 22).

On cross-examination, Ms. Neilson could not specifically state what other people were present when she talked to Mr. Steighner about her father testifying. (EH 23). She said that she wanted Jordan to testify because she felt the jurors would think that he was hiding something if he didn't testify. (EH 23).[3]

Jordan was recalled to the witness stand and stated that he knew of no hearing which was held to determine whether the 1976 conviction would be admissible. (EH 26). Mr. Hatten pointed out that Mr. Steighner did in fact file a motion in limine concerning the 1976 conviction. (EH 27).

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Jordan claims that he was denied effective assistance of counsel at trial because his trial attorney, Mr. Don Steighner, refused to allow him to testify at trial.[4] He claims that,

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[3]Neilson gave other testimony which is irrelevant to the issues raised in the instant petition.

[4]Mr. Steighner did not testify at the evidentiary hearing because he could not be located even after diligent search by the attorney general's office and the undersigned.

although he repeatedly requested Mr. Steighner to allow him to testify, Mr. Steighner refused and erroneously informed him that if he testified, the prosecution would expose his 1976 conviction for child abuse to the jury. He argues that since the 1976 conviction was more than ten years old it would not have been admissible under Mississippi Rule of Evidence 609. He further claims that at a subsequent civil trial[5] where the petitioner did testify and where the fact that he had been convicted of rape was introduced, two jurors still held in Jordan's favor with a lesser burden of proof. He argues that this is irrefutable evidence that his testimony would have made a difference in the outcome of his criminal trial.

To merit habeas corpus relief on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-prong test set out in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland test applies to retained counsel as well as appointed counsel. See, Bonvillain v. Blackburn, 780 F.2d 1248 (5th Cir. 1986); Murry v. Maggio, 736 F.2d 279 (5th Cir. 1984). In Strickland, the Supreme Court held that before post-conviction relief can be granted for

[5]The rape victim brought a civil suit against Jordan for damages.

ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result would have been different. Strickland, 466 U.S. at 687, 688; see also, Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988) (superseded on other grounds, Sawyer v. Butler, 881 F.2d 1272 (5th Cir. 1989)); Lavernia v. Lynaugh, 845 F.2d 493 (5th Cir. 1988); Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988); Thomas v. Lynaugh, 812 F. 2d 225 (5th Cir. 1987); Martin v. McCotter, 796 F.2d 813 (5th Cir. 1986). Thus, both a deficiency and resulting prejudice must be shown.[6] United States v. Lewis, 786 F.2d 1278, 1281 (5th Cir. 1986). A petitioner's failure to establish both prongs of the Strickland test warrants rejection of his claim. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986).

Under the deficiency prong of the Strickland test, a petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by

[6]However, there are circumstances where prejudice can be presumed. See, United States v. Cronic, 466 U.S. 648, 659 (1984); Woodard v. Collins, 898 F. 2d 1027, 1028 (5th Cir. 1990).

the Sixth Amendment. Strickland, 466 U.S. at 687; see also, Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). However, the Fifth Circuit has noted the following:

> In determining whether counsel's performance satisfies the requirements of the Sixth Amendment, we must inquire whether, considering all the circumstances, counsel's performance was reasonable under prevailing professional norms. Judicial scrutiny of counsel's performance must be highly deferential; we must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time.

Lavernia v. Lynaugh, 845 F.2d 493, 498 (5th Cir. 1988). In applying the first Strickland criterion, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action might be considered sound trial strategy. Bridge v. Lynaugh, 838 F.2d at 773; quoting Strickland v. Washington, 466 U.S. at 689. Finally, counsel is given great deference with a strong presumption that counsel has exercised reasonable professional judgment. Martin v. McCotter, 796 F.2d 816, 817 (5th Cir. 1986)

It is not enough to show that some, or even most, defense lawyers would have handled the case differently. Green v.

Lynaugh, 868 F.2d 176, 178 (5th Cir. 1989). As the Supreme Court has observed, "[i]t is all to tempting for a defendant to second-guess counsel's assistance after a conviction." Strickland, 466 U.S. at 689. It is likewise too facile "for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Green, 868 F.2d at 178, citing Strickland, 466 U.S. at 689.

The prejudice prong of the Strickland test requires a showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. It is not enough for the petitioner to show that the errors had some conceivable effect on the outcome of the proceeding, Sawyer v. Butler, 848 F.2d 582, 588 (5th Cir. 1988) (superseded on other grounds, Sawyer v. Butler, 881 F.2d 1272 (5th Cir. 1989)). The petitioner must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990); Murphy v. Puckett, 893 F.2d 94, 96 (5th Cir. 1990). A "reasonable probability" is one sufficient to undermine

confidence in the outcome of the proceeding. Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990); Loyd v. Smith, 899 F. 2d 1416, 1426 (5th Cir. 1990); Summit v. Blackburn, 795 F. 2d 1237, 1242 (5th Cir. 1986). An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Summit, 795 F.2d at 1242. A habeas corpus petitioner must affirmatively plead this resulting prejudice. Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988).

Because both the deficiency and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact, the court must make an independent determination of whether counsel's representation satisfied the Sixth Amendment. Marvin v. McCotter, 796 F. 2d 813, 817 (5th Cir. 1986), citing Mattheson v. King, 751 F. 2d 1432, 1438 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138.

In this case counsel's alleged deficiencies did not prevent any appellate review, nor did trial counsel entirely fail to subject the prosecution's case to meaningful adversarial testing; therefore, the standard set forth in Strickland requiring "an identifiable lapse in the performance of the

attorney" must be applied. Hamilton v. McCotter, 772 F.2d 171, 181-82 (5th Cir. 1985).

A review of the record reveals that Mr. Steighner filed a motion in limine to exclude any reference to the petitioner's prior conviction. (TR. 85). At a subsequent hearing on this motion, the trial court agreed to instruct the witnesses not to mention the prior conviction but refused to sustain the motion explaining that ". . . . there can occur in the course of a trial something that would make it competent evidence." (TR. 149-50). The undersigned concludes that Mr. Steighner's decision not to call Jordan as a witness, despite his repeated requests to do so, was a strategic decision made in light of the trial court's comment that the prior conviction might become competent evidence at some stage of the trial. Such a strategic choice does not support a claim of ineffective assistance of counsel and is not grounds for habeas corpus relief. See, Strickland, supra.

II. THE RIGHT TO TESTIFY

The petitioner next argues that his right to testify in his own behalf was violated when his defense counsel refused to call him as a witness despite his alleged repeated requests

and demands to be called. Jordan claims that the right to testify is a fundamental constitutional right that cannot be waived absent a knowing and intelligent waiver by the accused. He argues that the right to testify could not be waived by his counsel, his counsel's conduct, nor his own silence when his counsel rested the defense's case. Jordan also asserts that the infringement of his right to testify does not constitute "harmless error."

The respondents argue that Jordan effectively waived his right to testify by his conduct. The respondents submit that "by not taking the stand nor notifying the trial court of his desire to do so, and by acquiescing in his attorney's strategic decision to not call petitioner as a witness and expose him to potentially fatal cross-examination, petitioner effectively waived his right to testify at trial."

It is well-settled that the right to testify in one's own behalf is a fundamental constitutional right. Rock v. Arkansas, 485 U.S. 44, 51-56; 107 S.Ct. 2704, 2708-2711 (1987); Underwood v. Clark, 939 F.2d 473, 475 (7th Cir. 1991); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); United States v. Vargas, 920 F.2d 167, 169 (2nd Cir. 1990); United States v. Scott, 909 F.2d 488, 490 (11th

Cir. 1990); United States v. Martinez, 883 F.2d 750, 754 (9th Cir. 1989) vacated on other grounds United States v. Martinez, 928 F.2d 1470 (9th Cir. 1991); United States v. Jones, 880 F.2d 55, 59 (8th Cir. 1989); Wright v. Estelle, 572 F.2d 1071, 1075 (5th Cir. 1978) (Godbold,J. dissenting); Neal v. State, 525 So.2d 1279, 1283 (Miss. 1987); Culberson v. State, 412 So.2d 1184, 1186 (Miss. 1982). The right to testify in one's own behalf may not be waived by counsel but is personal to the criminal defendant and may be waived only by him or her. United States v. Scott, 909 F.2d 488, 490 (11th Cir. 1990); See also, United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); Nichols v. Butler, 917 F.2d 518, 520-21 (11th Cir. 1990) (panel opinion vacated, 932 F.2d 900 (11th Cir. 1991)) (rehearing en banc pending); Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987); Wright v. Estelle, supra at 1079 (5th Cir. 1978) (Godbold, J., dissenting). However, the trial court has no duty or obligation to advise a criminal defendant of his right to testify nor is a trial court required to assure an on-the-record waiver of the right to testify. Martinez, 883 F.2d at 757-59; United States v. Edwards, 897 F.2d 445, 446 (9th

Cir. 1990); Ortega v. O'Leary, 843 F.2d 258, 261 (7th Cir. 1988); Siciliano v. Vose, 834 F.2d 29,30 (1st Cir. 1987).

In order to determine whether John Jordan's right to testify was violated, the court must determine whether the final decision that he would not testify was made against his wishes. See, United States v. Teague, 908 F.2d 752, 759 (11th Cir. 1990) (panel opinion vacated and rehearing en banc granted, 932 F.2d 899 (11th Cir. 1991)). The question to be answered is "Did John Jordan make a knowing, voluntary, and intelligent waiver of his right to testify?" Teague, 908 F.2d at 759 citing Martinez, 883 F.2d at 756 (citations omitted).

The issue of waiver is a question of fact. Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989). A waiver of a fundamental constitutional right must be made knowingly and intentionally. United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989) (citing Johnson v. Zerbst, 304 U.S. 458, 474 (1938)) (Martinez vacated on other grounds United States v. Martinez, 928 F.2d 1470 (9th Cir. 1991)); Nichols, 917 F.2d at 521; Teague, 908 F.2d at 759; Bernloeher, 833 F.2d at 751. Furthermore, a reviewing court must "indulge every presumption against waiver of fundamental

constitutional rights." Ortega v. O'Leary, 843 F.2d 258, 262 (7th Cir. 1988) quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The various circuit courts of appeal have different views for determining what constitutes a waiver of the fundamental constitutional right to testify.[7] In the Ninth Circuit, that court has held that a defendant's silence at trial was an effective waiver of the right to testify. Martinez, supra, 883 F.2d 750; United States v. Edwards, 897 F.2d 445, 447 (9th Cir. 1990). In Martinez, the defendant argued that his attorney had refused to call him as a witness despite his request to be called and had impliedly threatened to withdraw as his defense counsel if he took the witness stand anyway. He did not testify and was convicted and sentenced. The Ninth Circuit found that the right to testify was a fundamental constitutional right which could only be waived by the accused himself, not by defense counsel, and must be waived knowingly and intentionally. Martinez, 883 F.2d at 754-56. However, the court found that Martinez's conduct at trial, i.e., his silence when his attorney rested, was an

[7]The Fifth Circuit has not squarely addressed this issue subsequent to Rock v. Arkansas. See, Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978); United States v. Scott, 909 F.2d 488, 491, n.1 (11th Cir. 1990).

effective waiver of his right to testify. Id. at 757-61; See also, United States v. Bagley, 837 F.2d 371, 376 (9th Cir. 1988) ("A defendant must claim the right to testify by attempting to take the stand, or this right is waived."). The court reasoned that "[T]o hold that a defendant may abide by his lawyer's advice and not take the stand and then invalidate the trial because he so acted is not fair to the government." Id. at 761; Edwards, 897 F.2d at 447. The First, Fourth, and Eighth Circuit Courts of Appeals have also used the "waiver-by-silence" rule when determining whether an accused waived his right to testify at trial. See, United States v. McMeans, 927 F.2d 162 (4th Cir. 1991); Siciliano v. Vose, 834 F.2d 29 (1st Cir. 1987); United States v. Bernloehr, 833 F.2d 749 (8th Cir. 1987).

In the Eleventh Circuit, however, that court has ruled that the absence of an on-the-record objection by the defendant himself is of little, if any, probative value in determining whether the decision that the defendant would not testify was his own decision. Teague, 908 F.2d at 759. In Teague, the defendant had been convicted and sentenced for a narcotics offense. In his motion for a new trial and in his subsequent appeal, Teague argued that his right to testify had been

violated because his attorney, in direct contravention of his desire to testify, had rested the defense's case without allowing him to testify. Id. at 756. The district court denied the motion for a new trial finding, inter alia, that Teague had made no objection when his attorney rested. Id. at 757. On appeal, the Eleventh Circuit held that "when, despite any efforts by defense counsel to convince the defendant that the best strategy is to remain silent, the defendant does not personally waive the right to testify and the defense counsel fails to allow the defendant to take the stand, the defendant's right to testify has been violated. Id. at 761; See also, Nichols v. Butler, 917 F.2d 518, 520-21 (11th Cir. 1990); Wright v. Estelle, 572 F.2d 1071, 1079 (5th Cir. 1978) (Godbold, J., dissenting).

The undersigned finds that the approach taken by the Ninth, Fourth, and Eighth Circuits is too harsh a penalty to exact upon a criminal defendant who is more usually than not uneducated in criminal or constitutional law and the rights afforded to a criminal defendant. To expect a defendant, who is relying upon the services and expertise of his defense counsel, to disrupt the trial proceedings in order to inform the court that, contrary to the advice of his

attorney, he wishes to testify is both unreasonable and unrealistic. See, Teague, 908 F.2d at 759. The undersigned finds that the analysis taken by the Eleventh Circuit, along with certain requirements for collateral review set by the Seventh Circuit, is the more plausible and fundamentally fair analysis to employ. Consequently, the undersigned finds that the right to testify is a personal right to the criminal defendant which cannot be forfeited by counsel, or by the mere silence of the accused at the time the defense rests, but only by a knowing, voluntary, and intelligent waiver by the defendant personally.[8] An attorney may not, as a tactical decision, forbid the defendant from testifying, but instead may only advise the defendant as to what the best approach would be. Galowski v. Murphy, 891 F.2d 629, 636 (7th Cir. 1989); Ortega, 843 F.2d 258, 261 (7th Cir. 1988) ("If a defendant insists on testifying, no matter how unwise such a decision, the attorney must comply with the request.").

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[8]Nothing in this Report and Recommendation is intended to prohibit defense attorneys from explaining the perils of testifying to their clients and attempting to convince them that despite their desire to take the stand, their best strategy would be to remain silent. The undersigned realizes that such discussions take place daily and that in most situations the defendants conclude that they should follow their attorney's advice and personally decide not to testify in their own behalf. When such an informed decision has been made by a criminal defendant, he cannot complain on collateral attack that he was denied his right to testify. A defendant may not sit idly by and allow his attorney to rest the defense without having expressed his desire to testify to his attorney. To do so would constitute a waiver of the right to testify.

At the evidentiary hearing conducted in the instant cause, Jordan testified that although he repeatedly asked to be allowed to testify, Mr. Steighner refused to call him as a witness and rested the defense's case without allowing Jordan to take the stand. (EH 4-6, 10-12). This testimony was corroborated by the testimony of his wife, Jo Jordan, (EH 16-18), and his daughter, Vicki Neilson, (EH 20, 23). There was no rebuttal or contradictory evidence presented since Mr. Steighner could not be located and was not present at the evidentiary hearing.[9] The undersigned finds that the evidence produced at the evidentiary hearing was believable and finds as a matter of fact that petitioner repeatedly requested to testify at his trial. The undersigned also finds that the decision that John Jordan would not testify was made against his wishes and that his right to testify in his own behalf was, therefore, violated. Furthermore, based on the evidence adduced at the evidentiary hearing the undersigned concludes that Jordan did not effect a voluntary and intentional waiver of that right.[10]

[9]This case is markedly different from the situation in Major v. Cabana, GC 86-260-D-O, in which this court found that habit evidence of defense counsel was sufficient to show that the defendant was advised of his right to testify and failed to assert it. Petitioner in this case repeatedly requested to testify.

[10]The undersigned does find, however, that Jordan knew he had a right to testify. Jordan was not a novice in criminal trial proceedings having already been convicted of a felony some eleven years earlier. Furthermore, Jordan was not the typical poor, uneducated

Finally, the undersigned cannot conclude that the violation of Jordan's right to testify was "harmless error" under Chapman v. California, 386 U.S. 18 (1967).[11] Before a federal constitutional error can be held harmless, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. Before an error may be considered harmless beyond a reasonable doubt, the reviewing court must determine that "absent the so-determined unconstitutional effect, the evidence remains not only sufficient to support the verdict but [is] so overwhelming as to establish guilt of the accused beyond a reasonable doubt." United States v. Garza, 754 F.2d 1202, 1207 (5th Cir. 1985) quoting Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir. 1980); Richardson v. Lucas, 741 F.2d 753, 755 (5th Cir. 1984).

In the case at bar, Jordan was identified as the rapist some two years after the rape even though the victim, on

defendant. He was a retired United States Air Force officer with a good education and stable financial affairs. The fact that he repeatedly asked Mr. Steighner to allow him to testify reveals that he knew that he had a right to testify.

[11]The harmless error rule announced in Chapman applies to cases in which there is an allegation that the defendant's right to testify was violated. Wright v. Estelle, 549 F.2d 971, 974 (5th Cir. 1977). However, in his dissenting opinion, Judge Godbold makes a strongly persuasive argument that a violation of the fundamental constitutional right to testify is beyond the harmless error analysis. See, Wright, 549 F.2d at 1080-82. But see, Sawyer v. Butler, 848 F.2d 582, 594 (5th Cir. 1988) superseded on other grounds Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) ("...if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.") (citations omitted).

several occasions, had viewed pictures of potential suspects which included John Jordan. The trial basically came down to a swearing match between the victim and Jordan. The victim testified that Jordan raped her while Jordan did not testify. At a subsequent civil trial brought by the victim against Jordan for damages, the rape conviction was revealed to the jury and Jordan did testify. Though the jury returned a verdict for the plaintiff, the jury vote was ten to two. Obviously, Jordan's testimony concerning his whereabouts at the time of the rape, the ownership of the jacket found by the sheriff, and the fact that the fingerprints taken from the scene were not his, had a substantial impact on the jury since two jurors returned a verdict for the defense. If two jurors would vote in John Jordan's favor under a preponderance of the evidence standard while knowing of his conviction for rape, the undersigned cannot conclude that the violation of his right to testify at his criminal trial was harmless beyond a reasonable doubt.

III. EPILOGUE

The undersigned is mindful of the possible onslaught of claims from state prisoners that they were denied their right

to testify at trial. However, a federal habeas corpus court is not a court of appeals but instead serves as a forum for constitutional collateral attacks upon state court convictions. As the Seventh Circuit noted in Ortega v. O'Leary, 843 F.2d 258,263 (7th Cir. 1988), "[I]n the habeas context, however, our review is limited to whether this error undermined the fundamental fairness of the trial." As the Eleventh Circuit noted in Nichols, "not every case in which the defendant does not testify raises a question about a violation of the right. Each case must be assessed on the basis of its individual facts to determine whether, indeed, the defendant has made a knowing, voluntary, and intelligent waiver. This is not to say that the trial court must undertake an inquiry in each case in which the defendant does not testify to make this assessment. That inquiry is necessary only when the issue is specifically raised for consideration by the court." Nichols, 917 F.2d at 521, n.1., citing Teague, 908 F.2d at 761.

In Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991), the Seventh Circuit Court of Appeals set forth the appropriate evidentiary requirements for proceeding in a federal habeas corpus court with a claim that the defendant was denied his

right to testify:

> There is a grave practical difficulty in establishing a mechanism that will protect a criminal defendant's personal right (that is, a right that is not waivable by counsel) to testify in his own behalf without rendering the criminal process unworkable. It is extremely common for criminal defendants not to testify, and there are good reasons for this, as we have seen. Yet it is simple enough after being convicted for the defendant to say, "My lawyer wouldn't let me testify. Therefore I'm entitled to a new trial." That's what Underwood did. His affidavit, which is the only evidence bearing on the question, states, so far as pertinent here, "I was denied the opportunity to testify at my own trial in that I told my attorney that I wished to testify on my own behalf. My attorney told me I could not testify."
>
> We agree with the First Circuit's ruling in Siciliano v. Vose, 834 F.2d 29, 31 (1st Cir. 1987), that this barebones assertion by a defendant, albeit made under oath, is insufficient to require a hearing or other action on his claim that his right to testify in his own defense was denied him. It just is too facile a tactic to be allowed to succeed. Some greater particularity is necessary -- and also we think some substantiation is necessary, such as an affidavit from the lawyer who allegedly forbade his client to testify -- to give the claim sufficient credibility to warrant a further investment of judicial resources in determining the truth of the claim.

Underwood, 939 F.2d at 475-76.

The undersigned concludes that a defendant need not protest that he is being denied his right to testify to the trial court during the trial and further that the trial court need not question a defendant about a waiver of the right, although it is a far better procedure to question the defendant outside the presence of the jury about his right to testify. However, in a subsequent collateral attack on the conviction, the defendant must produce something more than a bare, unsubstantiated, thoroughly self-serving, and none-too-plausible statement that his lawyer forbade him to take the witness stand in his own behalf. Id. at 476. The instant case contains persuasive, substantiated evidence that petitioner asserted his right to testify but was prevented from doing so by his attorney.

IV. CONCLUSION

Based on the foregoing, the undersigned respectfully recommends that the instant petition for habeas corpus relief be granted and that petitioner be released from custody unless granted a new trial within 120 days of this court's decision.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file

objections to the findings and recommendations herein contained. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging such findings and recommendations on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

Respectfully submitted this 10th day of February, 1992.

UNITED STATES MAGISTRATE JUDGE

No.

In the

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX B

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHN S. JORDAN, PETITIONER,

VERSUS CIVIL ACTION NO. EC91-130-S-D

STEVE PUCKETT, ET AL., RESPONDENTS.

MEMORANDUM OPINION DENYING PETITIONER'S WRIT OF HABEAS CORPUS

This cause is before the court on the objections filed by the respondents to the Report and Recommendation of Magistrate Judge Jerry Davis, dated February 10, 1992. The magistrate judge recommended that the motion of the petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be granted. The petitioner claims that he received ineffective assistance of counsel during trial and that he was denied the right to testify on his own behalf. Magistrate Judge Jerry Davis concluded in his report and recommendation that the petitioner did not receive ineffective assistance, but was denied his right to testify. After a thorough review of the record and transcripts of all proceedings, the court finds the following:

Facts

The petitioner was charged with the March 30, 1984, rape of Marie Redus. In February of 1987, the petitioner was found guilty of forcible rape in the Circuit Court of Oktibbeha County. Don Steighner, the petitioner's attorney, filed a motion to prevent the introduction during the rape trial of the petitioner's prior conviction for child sexual abuse in 1976. The Circuit Court ruled that, although the conviction was more than ten years old, it might become admissible under Rule 404(b) of the Mississippi Rules of Evidence. Upon this ruling, Mr. Steighner advised the petitioner not to testify. The petitioner did not testify. The Mississippi Supreme Court affirmed the jury verdict and refused the petitioner's request for post conviction relief.

On August 27, 1991, during an evidentiary hearing before Magistrate Judge Jerry Davis, the petitioner testified that he had repeatedly stated to Mr. Steighner that he wanted to testify during the trial, and that he did not realize that he would not be testifying until after the conclusion of the case. The petitioner's wife and daughter both testified that the petitioner had stated to Mr. Steighner that he wanted to testify. Mr. Steighner could not be located to testify at the

hearing.

Discussion

I. In Custody

The petitioner filed this writ of habeas corpus while incarcerated, but has since served his sentence. The petitioner was sued by the victim, Marie Redus, and a civil judgment has been entered against the petitioner. During the civil trial, the conviction for forcible rape was put before the jury. The petitioner continues to experience detriment from the alleged unconstitutional conviction and therefore satisfies the "in custody" requirement of 28 U.S.C. § 2254. See Carafas v. La Vallee, 391 U.S. 234 (1968).

II. Ineffective Assistance

The magistrate properly applied the two prong test of Strickland v. Washington, 466 U.S. 668 (1984), to determine whether the defendant received ineffective assistance of counsel. Mr. Steighner's decision not to call the petitioner to testify, in light of the circumstances of the case, did not fall below an objective standard of reasonable professional services. Additionally, the petitioner has failed to show any prejudice, since all that the petitioner was to testify about had been received into evidence through other witnesses. The

court agrees with the magistrate judge's conclusion that Don Steighner's representation of the petitioner satisfied the Sixth Amendment.

III. Right to Testify

The magistrate judge's report and recommendation relies heavily on United States v. Teague, 908 F.2d 752 (11th Cir. 1990), vacated, reh'g granted, en banc, United States v. Teague, 932 F.2d 899 (11th Cir. 1991). In Teague I, a divided three judge panel determined that a criminal defendant has a fundamental right to testify which cannot be waived by an attorney against the defendant's will. Teague had repeatedly asserted his desire to testify, although his attorney had advised him that he should not. Teague's attorney assumed he acquiesced to her advice, and did not call him to testify. Shortly after trial, Teague asked when he would be allowed to testify. Teague's attorney immediately filed a motion for new trial since she had not called Teague to testify.

Fifteen days after the magistrate judge's report and recommendation, in this case, the Eleventh Circuit on rehearing in United States v. Teague, 953 F.2d 1525 (11th Cir. 1992) (en banc), vacated the panel decision. The full

court concluded that although the right to testify is fundamental and personal to the criminal defendant, the proper avenue for redressing the denial of the right to testify is to prove ineffective assistance of counsel. The Eleventh Circuit reasoned:

> Because it is primarily the responsibility of defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected, we believe the appropriate vehicle for claims is that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

United States v. Teague, 953 F.2d at 1534. In light of the decision of the Eleventh Circuit after rehearing, the court cannot adopt the magistrate judge's report and recommendation as to the petitioner's right to testify.

The petitioner wanted to testify and understood that he had a right to testify, but on the advice of his attorney, he chose not to testify. A trial court has no duty or obligation to procure an on-the-record waiver of the right to testify. See United States v. Martinez, 883 F.2d 750, 757-59 (9th Cir. 1989); Ortega v. O'Leary, 843 F.2d 258, 261 (7th Cir. 1988); Siciliano v. Vose, 834 F.2d 29, 30 (1st Cir. 1987). When the petitioner failed to exert his desire to testify through his

attorney or on his own during trial, he waived his right to testify. See Hollenbeck v. Estelle, 672 F.2d 451 (5th Cir. 1982) ("Post-conviction displeasure with his attorney's advice does not change the basic constitutional determination [that Hollenbeck was not denied his right to testify]."); Siciliano v. Vose, 834 F.2d at 30 (absent an attempt to take the stand waives right to testify); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (knowledge of right to testify, but not testifying, is waiver); United States v. Bernloehr, 833 F.2d 749, 751-52 (8th Cir. 1987) (defendant cannot claim denial of right to testify after apparently accepting attorney's advice not to testify); United States v. Edwards, 897 F.2d 445, 446-47 (9th Cir. 1990) (silence during trial is waiver).

As is indicated by portions of the civil trial transcript submitted by both parties, the petitioner accepted his attorney's advice not to testify. When questioned about not testifying at the criminal trial, Jordan stated:

> A. Did I make that decision?
> Q. Yes, sir?
> A. I took advisement and made the decision.

John Jordan testimony at civil trial, p. 153. Continuing on page 155 of the trial transcript:

Q. Mr. Jordan, a year ago, you exercised your right and you chose not to testify in that case when you were charged with rape in the criminal trial, is that correct?
A. No. No. You said I chose.
Q. Yes, sir.
A. No, I didn't. I didn't chose. I was working you know, on the advisement of my attorneys.

Although it appears the petitioner wanted to testify, he clearly decided not to testify upon the advice of his attorney, Don Steighner. "To hold that a defendant may abide by his lawyer's advice and not take the stand and then invalidate the trial because he so acted is not fair to the government." United States v. Martinez, 883 F.2d 750, 761 (9th Cir. 1989) (vacated on other grounds). Since the court has found Don Steighner's advice not to have been ineffective under the Sixth Amendment, the petitioner's acceptance of that advice, or his failure to assert to the court his desire to testify, is a waiver of his right to testify.

Accordingly, the magistrate judge's report and recommendation is affirmed and adopted in part and denied in part, and the petitioner's motion for writ of habeas corpus is denied.

An ORDER in accordance with this opinion shall be entered.

This the 15th day of October, 1993.

CHIEF JUDGE

No. _____

In The

Supreme Court of the United Sates

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX C

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

John S. JORDAN, Petitioner-Appellant,

v.

Edward HARGETT, Superintendent, Mississippi State Penitentiary, et al., Respondents-Appellees.

No. 93-7660.

United States Court of Appeals,
Fifth Circuit.

Oct. 7, 1994.

Defendant was convicted of forcible rape. The Mississippi Supreme Court affirmed both his conviction, 543 So.2d 191, and denial of post conviction relief, 577 So.2d 368. Defendant petitioned for writ of habeas corpus alleging violation of his right to testify on his own behalf. The United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge, denied petition, and defendant appealed. The Court of Appeals, Reavley, Circuit Judge, held that (1) district court was required to conduct evidentiary hearing before rejecting magistrate's fact-findings supporting his recommendation that petition be granted; (2) defendant's failure to make record of his desire

to testify did not create irrebutable presumption of waiver; (3) any violation of right to testify was constitutional trial error subject to harmless error analysis; and (4) if violation occurred, it was not harmless.

Reversed and remanded.

Jim Waide, Tupelo, MS, for appellant.

Jo Ann McFarland McLeod, Asst. Atty. Gen., Mike Moore, Atty. Gen., Jackson, MS, for appellees.

Appeal from the United States District Court for the Northern District of Mississippi.

Before REAVLEY, DeMOSS and STEWART, Circuit Judges.

REAVELY, Circuit Judge:

John Jordan filed a petition for writ of habeas corpus asserting that his constitutional right to testify had been violated in the course of his state court trial for rape. The district court denied the petition. We reverse and remand.

BACKGROUND

In 1987, Jordan was tried and convicted in Mississippi state court for the rape of G.R. After exhausting his state

remedies, he sought federal habeas corpus relief. He alleged that he was denied his right to testify on his own behalf at trial. A magistrate judge conducted an evidentiary hearing on this claim. Jordan testified at the hearing that he informed his attorney prior to trial and during each trial recess that he wished to testify. In particular, he wished to testify that he was visiting relatives in Dallas at the time of the rape. He further wanted to testify to refute the victim's description of him as the rapist, to point out that the fingerprints taken from the scene were not his, and to show that the jacket taken from his house in 1986 by the sheriff was different from the jacket the victim described the rapist as wearing. Jordan stated that his lawyer told him he could not testify because such testimony might result in the jury learning of Jordan's 1976 conviction for child molestation. Jordan's wife and daughter corroborated his testimony. The magistrate found the testimony of the witnesses believable and uncontradicted. Jordan's attorney from the state trial could not be located and did not testify at the habeas hearing.

The magistrate recommended that habeas corpus relief be granted. After hearing the testimony, the magistrate made factual findings that Jordan repeatedly requested to testify at

trial, that his counsel's decision not to call him was made against his wishes, that Jordan understood that he had a right to testify, and that he never voluntarily and intentionally waived that right.

The district court rejected the magistrate's recommendation and denied the request for habeas corpus relief. The court concluded that Jordan had waived his right to testify by voluntarily choosing not to testify on the advice of his attorney, and by failing to assert his right to testify either through his attorney or on his own during the state trial.

DISCUSSION

[1,2] A criminal defendant has a fundamental constitutional right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S.Ct. 2704, 2708-10, 97 L.Ed.2d 37 (1987). This right is granted to the defendant personally and not to his counsel. *Id.* at 51, 107 S.Ct. at 2709. *See also United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.) (on rehearing en banc) ("We now reaffirm that a criminal defendant has a *fundamental* constitutional right to testify in his or her own behalf at trial. This right is personal

to the defendant and cannot be waived either by the trial court or by defense counsel."), *cert. denied*, —U.S.—, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992).

A. *Whether a Constitutional Violation Occurred*

[3] A defendant may of course waive his right to testify, and frequently does so on the advice of counsel. We would find no violation of the right to testify if Jordan acquiesced during trial to his attorney's recommendation that he not testify and later decided that he should have testified. Instead, a violation of this right only occurred if the "final decision that [defendant] would not testify was made against his will. In other words, we must determine whether [defendant] made a knowing, voluntary and intelligent waiver of his right to testify." *United States v. Teague*, 908 F.2d 752, 759 (11th Cir. 1990), *rehearing granted*, 953 F.2d 1525 (11th Cir.), *cert. denied*, —U.S.—, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992).

Based on his report and recommendation we conclude that the magistrate fully understood the relevant factual inquiry. He concluded that Jordan had repeatedly asked to testify, had never voluntarily waived his right to testify, and that "the decision that John Jordan would not testify was

made against his wishes." These findings are findings of fact, and are based on the magistrate's view of the credibility of the witnesses he observed.

The district court rejected the magistrate's findings and recommendation. It relied in part on testimony from Jordan in the civil case G.R. brought against Jordan, which suggests that Jordan chose not to testify in the prior criminal trial on the advice of counsel. This evidence was offered by the State after the magistrate issued his report and recommendation.

[4] We have often stated, in cases where the district court *adopts* the fact findings of a magistrate who conducted an evidentiary hearing, that on appeal we should defer to such findings unless clearly erroneous.[1] The district court, however, is not so limited in its review. Under 28 U.S.C. § 636(b)(1)(C), which governs district court review of a magistrate's findings of fact and recommendations for the disposition of applications for post-conviction relief:

> A judge of the court shall make a de novo determination of those portions of the report or

[1] *E.g., Johnson v. Collins*, 964 F.2d 1527, 1536 (5th Cir.), *cert. denied*,—U.S.—, 113 S. Ct. 4, 120 L.Ed.2d 933 (1992); *McInerney v. Puckett*, 919 F.2d 350, 352 (5th Cir.1990); *Meyer v., Estelle*, 621 F.2d 769, 775 (5th Cir.1980); *Parnell v. Wainwright*, 464 F.2d 735, 737 n. 1 (5th Cir.1972) ("The magistrate's findings of fact receive the imprimatur of Rule 52(a) by the district court's adoption of those findings as its own.").

> specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

See also Louis v. Blackburn, 630 F.2d 1105, 1110 (5th Cir.1980) ("The district judge, in his decision whether to reject or accept the magistrate's recommendations, is not limited to a clearly erroneous standard as we are in our appellate review of facts found by the district courts."); *Tijerina v. Estelle*, 692 F.2d 3, 5 (5th Cir.1982) ("Under the Federal Magistrate's Act, the district court may give to the magistrate's proposed findings of fact and recommendations '... such weight as [their] merit commands and the sound discretion of the judge warrants.'") (quoting *Matthews v. Weber*, 423 U.S. 261, 273, 96 S.Ct. 549, 556, 46 L.Ed.2d 483 (1976)).

[5] While the statute, by its terms, grants the district court broad discretion to accept or reject a magistrate's fact findings, we have placed some limits on that discretion. In particular, we have limited district court discretion to *reject* a fact finding of the magistrate where (1) the finding is based

on the credibility of the witnesses the magistrate heard, and (2) the finding is dispositive of an application for post-conviction relief involving the constitutional rights of a criminal defendant. In *Blackburn* we held that in such circumstances the district judge cannot reject the finding without personally hearing live testimony from the witnesses whose testimony is in issue. We explained:

> One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses. The Supreme Court has emphasized, in cases that involve the constitutional rights of criminal defendants, that factual findings may not be made by someone who decides on the basis of a cold record without the opportunity to hear and observe the witnesses in order to determine their credibility.

If the district judge doubts the credibility determination of the magistrate, only by hearing the testimony himself does he have an adequate basis on which to base his decision.

In order to adequately determine the credibility of a witness as to such constitutional issues, the fact finder must observe the witness. This may be accomplished either by the district judge accepting the determination of the magistrate

after reading the record, or by rejecting the magistrate's decision and coming to an independent decision after hearing the testimony and viewing the witnesses.

Blackburn, 630 F.2d at 1109-10 (citations omitted).

[6] We conclude that the district court erred in rejecting the magistrate's credibility-based fact findings without conducting its own evidentiary hearing. We believe that Jordan's testimony from the civil trial was not sufficiently telling for the district court to reject the magistrate's fact findings without conducting its own hearing.[2] Further, as discussed below, we can find no alternative ground for affirming the district court's decision. Consistent with *Blackburn*, therefore, we remand the case for further proceedings.

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[2]The testimony from the civil trial can be read to suggest that Jordan waived his right to testify on the advice of counsel, but it is not conclusive. At one point in the civil trial he testified as follows:

Q: Why didn't you testify a year ago [at the criminal trial]?
A. I--It didn't seem necessary to--to testify. It--I--I had my--the trial was by advisement of my attorneys; and, they didn't think it was necessary that I even testify.
Q. But you made that decision also; did you not?
A: Did I make the decision?
Q: Yes, sir.
A. I took advisement and made the decision.

However, shortly thereafter, he offered the following testimony:

Q. Mr. Jordan, a year ago you exercised your right and you chose not to testify in that case when you were charged with rape in the criminal trial; is that correct?
A. No. No. You said I chose.
Q. Yes, sir.
A. No, I didn't; I didn't choose. I was working, you know, on the advisement of my attorneys.

B. *The Effect of Failure to Object*

[7] Neither Jordan nor his counsel made a record in the state trial of Jordan's desire to testify. In similar circumstances some courts have concluded that the defendant waived his right to testify.[3] We do not believe that a defendant's failure to make a record of his desire to testify against his counsel's wishes is always fatal. Unlike many trial errors asserted in habeas proceedings, this alleged error by its very nature is one where the defendant and his lawyer are necessarily at odds with each other. We think it unrealistic to expect that defense counsel will always bring this attorney-client dispute to the attention of the trial court. Likewise, we believe that a rule requiring the defendant personally to make such a record is inappropriate. We agree with the reasoning of the panel opinion in *Teague*:

> The defendant may not realize until after the jury has retired to deliberate that the proper time for his testimony has passed. Furthermore, once a defendant elects to take advantage of his right to counsel, he is told that all further communications with the court and the prosecutor should be made through his attorney. Aside from any testimony he may give at

[3] *E.g., United States v. Edwards*, 897 F.2d 445, 447 (9th Cir.), *cert. denied*, 498 U.S. 1000, 111 S.Ct. 560, 112 L.Ed.2d 567 (1990); *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir.1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249, 111 S.Ct. 2886, 115 L.Ed.2d 1052 (1991); *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir.1987); *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir.1987).

> pre-trial hearings or during trial, a defendant is not permitted to speak directly to the court. In fact, in the interests of decorum and the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court. It would be anomalous to consider the right to counsel of fundamental importance because of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his attorney to be his sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of fundamental importance such as the right to testify.

Teague, 908 F.2d at 759-60 (footnote omitted). The uncertainty in this area could be avoided if counsel would obtain a signed statement from the defendant or if trial courts would conduct a colloquy and obtain, outside of the jury's hearing, a statement on the record from the non-testifying defendant that he is aware of his right to testify and has chosen voluntarily to waive that right.[4]

We do not mean to suggest that a defendant's failure to object in the state court proceeding is entirely irrelevant.

[4]The courts are not in uniform agreement on whether such a colloquy from the trial court is advisable. State and federal courts widely have held that such a colloquy is not required. *See Martinez*, 883 F.2d at 757. The majority opinion in *Martinez* argues that such a court inquiry not only is not required, but is an inappropriate intrusion into the attorney-client relationship. *Id. See also Siciliano*, 834 F.2d at 30 (Breyer, J.) ("To require the trial court to

That silence may itself be evidence of voluntary waiver of the right to testify. In the absence of evidence in the state court record of the defendant's wish to testify, we think it appropriate for the habeas court to presume that the defendant acquiesced in his counsel's advice or otherwise made a voluntary choice not to testify. We hold only that such silence does not raise an irrebuttable presumption of waiver. Here the magistrate as fact-finder carefully considered the live evidence presented and the credibility of the witnesses, and we cannot say on this record that Jordan waived his right to testify.

C. *Whether the Constitutional Error, if Any, Was Harmless*

[8] The State argues in the alternative that even if Jordan's right to testify was denied, such a constitutional violation was harmless error which does not justify habeas corpus relief. In *Brecht v. Abrahamson*,—U.S.—, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court addressed the standard for determining, in a federal habeas corpus proceeding, whether a conviction must be set aside because

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follow a special procedure, explicitly telling defendant about, and securing an explicit waiver of, a privilege to testify (whether administered within or outside the jury's hearing), could inappropriately influence the defendant to waive his constitutional right not to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right."). In contrast, the dissent in *Teague* would require courts to establish on the trial record a waiver of the defendant's right to testify. *Teague*, 953 F.2d at 1544 (Clark, J., dissenting).

of constitutional error. The constitutional error in that case was a *Doyle* error which occurred when the prosecution made reference to the defendant's post-*Miranda* silence. *Id.* at—, 113 S.Ct at 1713-14. The Court discussed in general the distinction between "trial errors" which are amenable to harmless-error analysis and "structural defects," such as denial of the right to counsel, which require automatic reversal of the conviction "because they infect the entire trial process." *Id.* at—, 113 S.Ct. at 1717. The Court held that the standard for determining whether habeas relief must be granted is whether the *Doyle* error "had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at—, 113 S.Ct. at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). This standard must now be followed in habeas proceedings, in lieu of the "harmless beyond a reasonable doubt" standard announced in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and applied in direct appeals. Since *Brecht*, our court and others have held generally that the *Brecht*/*Kotteakos* standard applies in habeas proceedings where the court must decide whether a constitutional trial error requires reversal of the conviction.

E.g., *Kyles v. Whitley*, 5 F.3d 806, 807 (5th Cir.1993) (holding that in habeas proceedings *Brecht* standard "controls all trial, as distinguished from structural, errors"); *Shaw v. Collins*, 5 F.3d 128, 132 (5th Cir.1993); *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir.1993).

Justice Stevens, concurring in *Brecht*, explained that the *Kotteakos* standard "places the burden on prosecutors to explain why those errors were harmless" and "requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations." —U.S. at—, 113 S.Ct. at 1723. As we noted in *Lowery*:

> Justice Stevens, in his concurring opinion in *Brecht*, wrote to explicate the *Kotteakos* standard and to "emphasize that the standard is appropriately demanding." Under *Kotteakos*, "the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution" unless that "error is merely 'technical'"--which a constitutional violation could never be.

996 F.2d at 773 (footnote omitted) (quoting Brecht, —U.S. at—, 113 S.Ct. at 1723-24 (Stevens, J., concurring)).

[9-11] We conclude that this case involves a trial error and so the *Brecht* standard should govern.[5] If a

[5]But see *Wright v. Estelle*, 572 F.2d 1071, 1080-82 (5th Cir.) (en banc) (Godbold, J., dissenting) (suggesting that denial of defendant's right to testify should be reversible per

constitutional error occurred, we would hold based on the record before us that it "had substantial or injurious effect or influence in determining the jury's verdict." The burden was on the State to demonstrate otherwise, and it did not meet this burden. This case is not one where the evidence of guilt was so overwhelming that we can say that the constitutional error, if any, was harmless under the *Brecht* standard. Numerous witnesses (albeit relatives) testified at trial in support of Jordan's alibi--that he was in or on his way to Dallas at the time of the rape. G.R. did not identify Jordan as the rapist until the summer of 1986, some two years after she had been shown photographs of Jordan and other suspects on several occasions. Jordan claims that her incentive for identifying him as the rapist was financial. She obtained counsel to bring a civil suit against Jordan in the summer or fall of 1986, and ultimately won a large

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se), *cert. denied*, 439 U.S. 1004, 99 S. Ct. 617, 58 L.Ed.2d 680 (1978). We also note that when the Eleventh Circuit decided the *Teague* case en banc, it adopted an approach different from the one we choose to follow. Although the *Teague* court held that "a criminal defendant has a fundamental constitutional right to testify on his behalf, that this right is personal to the defendant, and that the right cannot be waived by defense counsel," 953 F.2d at 1535, it concluded that a claim that the defendant was denied his right to testify should be reviewed as an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 953 F.2d at 1534. We cannot agree with this approach. First we believe that the right of a defendant to testify on his own behalf is a fundamental constitutional right entirely separate from his right to counsel. Second, in our view, treating a claimed denial of the defendant's right to testify as an ineffective assistance of counsel claim ignores recognition of the right as one personal to the defendant which can never be waived by counsel, competent or not.

judgement against Jordan. Jordan testified at the civil trial, and points out that even with the lower burden of proof in that proceeding and even though the fact of his rape conviction was brought out at the civil trial, the jury was split ten to two on the verdict.[6] Jordan offered plausible reasons that his own testimony would have helped his case. Further, his lawyer's reason for not calling him seems implausible. The child molestation conviction was more than ten years old. Mississippi Rule of Evidence 609(b) is the same as Fed.R.Evid. 609(b), and provides that evidence of a conviction more than ten years old is not admissible unless "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect," and "the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence..." Our review of the state and federal court records indicate that these requirements were not met.

CONCLUSION

We reverse the district court's order denying the habeas

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[6]The magistrate observed: "If two jurors would vote in John Jordan's favor under a preponderance of the evidence standard while knowing of his conviction for rape, the undersigned cannot conclude that the violation of his right to testify at his criminal trial was harmless beyond a reasonable doubt."

corpus petition, and remand the case for further consideration consistent with this opinion.

REVERSED and REMANDED.

No. _____

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX D

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7660

JOHN S. JORDAN, **Petitioner-Appellant,**

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,
ET AL., **Respondents-Appellees.**

Appeal from the United States District Court for the Northern District of Mississippi

(Opinion October 7, 1994, 5 Cir., 1994, ___F.3d,___)

(January 13, 1995)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART AND PARKER, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the court's own motion, having determined to have this case

reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

No.

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX E

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7660

D.C. Docket No. CA-1:91-130

JOHN S. JORDAN,

Petitioner-Appellant,

versus

EDWARD HARGETT, SUPERINTENDENT,

MISSISSIPPI STATE PENITENTIARY, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

Before POLITZ, Chief Judge, REAVLEY, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

JUDGEMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the opinion and judgment of the panel of this Court of October 7, 1994 is vacated; and that the judgment of the district court is vacated, and that the cause is remanded to the District Court for further proceedings consistent with the opinion of the court en banc.

May 15, 1995

Issued as mandate:

No.

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX F

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7660

JOHN S. JORDAN,

Petitioner-Appellant,

versus

EDWARD HARGETT, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY, ET AL.,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before POLITZ, Chief Judge, REAVLEY, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART and PARKER, Circuit Judges.

PER CURIAM:

The panel ordered this case remanded to the district judge to conduct his own evidentiary hearing before rejecting

the magistrate judge's findings on the credibility of the witnesses. Jordan v. Hargett, 34 F.3d 310 (5th Cir. 1994). Since vacating the panel opinion, the en banc court is informed that the attorney who defended Jordan in the state trial but did not testify at the magistrate judge's hearing has now been located and is prepared to contribute his testimony on the question of whether the defendant acceded to the attorney's advice in not testifying. Because of the uncertainty of what may ultimately be determined to be the facts underlying the questions raised in this case, we conclude that we need not decide the questions of constitutional law discussed in the panel opinion. The panel opinion remains vacated. We remand to the district court for further proceedings.

Judgement of the District Court is VACATED and Case REMANDED.

No. _____

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX G

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHN S. JORDAN, PETITIONER

VERSUS CIVIL ACTION NO. EC91-130-S-D

STEVE PUCKETT, ET AL., RESPONDENTS.

MEMORANDUM OPINION DENYING
PETITIONER'S WRIT OF HABEAS CORPUS

This cause is before the court on the petitioner's motion for a writ of habeas corpus. This cause was remanded by the Court of Appeals for the Fifth Circuit, en banc, for the purpose of taking testimony of Donald Steighner, one of the attorneys who represented the petitioner during his criminal trial. Having conducted a full evidentiary hearing, the court issues this memorandum simply to augment and clarify its bench opinion.

Facts

The petitioner was charged with the March 30, 1984, rape of Marie Redus. In February of 1987, the petitioner was found guilty of forcible rape in the Circuit Court of Oktibbeha County. Don Steighner and Rufus Ward, the petitioner's attorneys, filed a motion to prevent the

introduction during the rape trial of the petitioner's prior conviction for child sexual abuse in 1976. The Circuit Court ruled that although the conviction was more than ten years old, it might become admissible under Rule 404(b) of the Mississippi Rules of Evidence. Upon this ruling, Mr. Steighner advised the petitioner not to testify. The petitioner did not testify. The Mississippi Supreme Court affirmed the jury verdict and refused the petitioner's request for post conviction relief.

On August 27, 1991, during an evidentiary hearing before Magistrate Judge Jerry Davis, the petitioner testified that he had repeatedly stated to his attorneys that he wanted to testify during the trial, and that he did not realize that he would not be testifying until after the conclusion of the case. The petitioner's wife and daughter both testified that the petitioner had stated to Mr. Steighner that he wanted to testify. Mr. Steighner could not be located to testify at the hearing. The magistrate judge recommended that the petitioner's writ of habeas corpus be granted.

This court affirmed and adopted in part and denied in part the magistrate judge's report and recommendation. The magistrate judge concluded that the petitioner had not been

denied effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), but alternatively, pursuant to United States v. Teague, 908 F.2d 752 (11th Cir. 1990), found that the petitioner had been denied his constitutional right to testify. The Eleventh Circuit panel opinion relied upon by the magistrate judge was vacated by United States v. Teague, 932 F.2d 899 (11th Cir. 1991). The en banc decision concluded that the appropriate means of determining whether a criminal defendant had been denied his fundamental right to testify was according to the test for ineffective assistance of counsel set out in Strickland v. Washington. Since the law which the magistrate judge had relied upon was no longer valid and since he had already determined that the petitioner had not received ineffective assistance of counsel, then this court declined to adopt the magistrate judge's analysis of the petitioner's right to testify. On appeal, a Fifth Circuit panel reversed and remanded the cause, asserting that this court had overruled a factual conclusion of the magistrate judge without having held an evidentiary hearing. See Jordan v. Hargett, 34 F.3d 310 (5th Cir. 1994) vacated, reh'g granted, en banc. Additionally, the panel, in footnote 5, denounced the use of the Strickland v. Washington test to determine

whether a defendant had been denied the fundamental right to testify, as adopted by the Teague en banc opinion. Since the panel decisions of both the Teague and the Jordan courts have been vacated, the appropriate law of the case has not been settled.

Discussion

I. Ineffective Assistance of Counsel

A claim that counsel has rendered ineffective assistance will succeed only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). Additionally, there must be a "reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993).

The court discovered during the evidentiary hearing that the petitioner was not only represented by Donald Steighner, against whom the petitioner addresses all of the blame, but also Rufus Ward. The petitioner must show that Steighner's and Ward's actions were objectively unreasonable such that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."

Id. When reviewing the representation given the petitioner, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

The Federal Rules of Civil Procedure had only been adopted by the Mississippi Supreme Court a few months prior to the rape trial. Since the petitioner's prior felony conviction was more than ten years old, Steighner filed a motion in limine in order to prevent any witnesses from accidentally testifying about it. The Circuit Judge held that the conviction was not admissible, but that it might become admissible for some reason during the course of the trial.

The petitioner states that Steighner informed him that if he testified, the conviction might be used against him. Both attorneys stated that they were reluctant to put the petitioner on the stand due to his tendency to elaborate upon his answers. As is a fear with most defense attorneys, it seems the petitioner's attorney did not feel that they could predict what the petitioner would say. When the petitioner testified initially at the evidentiary hearing, he was direct and spoke

clearly. When the petitioner testified on rebuttal, he had to be cut short several times to prevent him from rambling too far from the subject of the questions. Quite easily he could open areas for damaging cross examination and redirect testimony. Especially, since during the time of the petitioner's rape trial, there were pending charges against him for molesting his granddaughter. The principle witness on rebuttal at the rape trial was the petitioner's youngest daughter who is the mother of the child the petitioner allegedly molested. Steighner and Ward were aware of the tremendous animosity between the petitioner and his daughter and that the state prosecutor had her available to use on rebuttal if petitioner testified and "opened the door" for her testimony. Recommending that the petitioner not testify was not objectively unreasonable.[1]

The second prong of the Strickland test requires the petitioner show affirmatively that his trial counsel's actions prejudiced his defense. Id. at 693. "The command of the constitution is for a battle, not a victory." United States v. Rubin, 433 F.2d 442, 444 (5th Cir. 1970). He must "show

[1]The court notes that over a year after the rape trial, Donald Steighner represented the petitioner on the child molestation charges, which were dismissed after one mistrial and the empaneling of another jury. It seems odd that the petitioner continued to use an attorney which had allegedly prevented him from testifying.

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. As discussed by the magistrate judge in his report and recommendation, everything the petitioner wished to testify about had already been heard by the jury from other witnesses. The court continues to agree with the magistrate judge's conclusion that the petitioner suffered no prejudice from his attorneys' advice not to testify.

II. Fundamental Right to Testify

If the appropriate analysis of whether a defendant has been denied his fundamental right to testify is pursuant to the Strickland v. Washington ineffective assistance of counsel test, then as previously discussed, the petitioner has no valid claim. If the right to testify is "personal to the defendant which can never be waived by counsel, competent or not," then the question is whether the petitioner waived his right to testify.[2] Jordan, 34 F.3d at 316 n. 5. Once again quoting a portion of the petitioner's testimony during the civil rape trial when questioned about not testifying at the criminal trial,

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[2]Presumably, since the Jordan I panel announced this new approach and was going to apply it to this case, then the new approach, if again announced as the law of the case, is to be given retroactive application to at least February 1987.

Jordan stated;

A. Did I make that decision?
Q. Yes, sir?
A. I took advisement and made the decision.

John Jordan's testimony at civil trial, p. 153. Continuing on page 155 of the trial transcript:

Q. Mr. Jordan, a year ago, you exercised your right and you chose not to testify in that case when you were charged with rape in the criminal trial, is that correct?
A. No. No. You said I chose.
Q. Yes, sir.
A. I didn't. I didn't chose; I was working you know, on the advisement of my attorneys.

No one disputes that the petitioner wanted to testify. Just as clearly, from the testimony of both Steighner and Ward during the evidentiary hearing, the petitioner accepted his attorney's advice and chose not to testify. Just because the petitioner acquiesced to the advice of Steighner and Ward does not mean he agreed with it, or in retrospect, does not wish that he had insisted upon testifying. "To hold that a defendant may abide by his lawyer's advice and not take the stand and then invalidate the trial because he so acted is not fair to the government." United States v. Martinez, 883 F.2d 750, 761 (9th Cir. 1989) (vacated on other grounds). The

petitioner's acceptance of that advice, or his failure to assert his desire to testify, is a waiver of his right to testify. The court finds that petitioner knowingly and voluntarily waived his right to testify.

An order in accordance with this memorandum opinion shall be issued.

This 25th day of September, 1995.

_____

CHIEF JUDGE

No. _____

In The

Supreme Court of the United States

October Term, 1996

JOHN JORDAN,

Petitioner,

VERSUS

EDWARD HARGETT, Superintendent, MISSISSIPPI STATE PENITENTIARY, and MIKE MOORE, Attorney General for the State of Mississippi,

Respondents.

APPENDIX H

JIM WAIDE
WAIDE LAW OFFICE
POST OFFICE BOX 1357
TUPELO, MS 38802
601/842-7324

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60627
Summary Calendar

JOHN S. JORDAN,

Plaintiff-Appellant,

versus

MIKE MOORE, Attorney General of the State of Mississippi; RAYMOND ROBERTS, Superintendent, Mississippi State Penitentiary,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

(1:91-CV-130-S-D)

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

John S. Jordan appeals from the district court's denial of his motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Jordan argues that his attorney denied him the right

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

to testify during his state court trial for rape.[1] A defendant in a criminal proceeding has a fundamental constitutional right to testify in his or her own defense. Rock v. Arkansas, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 2708-10, 97 L.Ed.2d 37 (1987). During an evidentiary hearing before the district court, Jordan's attorney, Donald Steighner, testified that Jordan wanted to take the stand, but that he advised against it and Jordan ultimately decided that it would not be in his best interest to take the stand. Although Jordan, his wife, and his daughter disputed this testimony, the district court credited Steighner's testimony that Jordan accepted his advice not to testify. We will not disturb that determination on appeal. The assessment of the credibility of the witnesses is peculiarly within the province of the district court, and will not be lightly disturbed. See United States v. Casteneda, 951 F.2d 44, 48 (5th Cir. 1992). Because Steighner's testimony was not unbelievable, we conclude that the district court did not clearly err in finding that Jordan accepted his attorney's recommendation that he not testify.

Having knowingly and voluntarily waived his right to

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[1] A more detailed procedural history may be found in his Court's earlier decision. See Jordan v. Hargett, 35 F.3d 310 (5th Cir. 1994), vacated and remanded, 53 F.3d 94 (5th Cir. 1995).

testify, Jordan will not be heard to complain on appeal that the trial court or his defense counsel had to specifically establish in the trial-court record his knowing and voluntary waiver. Although the controversy over whether a defendant waived his right to testify could be easily avoided if counsel would obtain a signed waiver from the defendant or the trial court would procure the defendant's waiver on the record, this practice is not currently required in this court.

Jordan also asserts that even if he did waive his constitutional right to testify, such waiver was not voluntary because it was based upon his attorney's erroneous legal advice. See Jordan v. Hargett, 34 F.3d 310, 312 (5th Cir. 1994) (waiver of the right to testify must be knowing, voluntary and intelligent). He asserts that one of the considerations in his decision not to testify was based on the possibility that a conviction more than ten years old would be received into evidence. He argues that his attorney, Steighner was unaware that Mississippi law requires that "the proponent give[] to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence." Miss. R. Evid. 609(b).

Contrary to Jordan's assertion that his consent was not informed and voluntary based on Steighner's unawareness of the Rule 609(b) written notice requirement,[2] a review of the record reveals that the conviction was only one of several concerns that prompted Steighner to advise Jordan against testifying. Steighner testified during the evidentiary hearing that he was worried if Jordan testified, "his forcefulness in denying this incident and anything like it in his life would open doors to the prosecution of far-ranging potential for damage." Specifcally, Steighner was concerned that Jordan might testify about extraneous offenses or other matters that would make the conviction admissible.

Furthermore, Jordan wanted to deny pending charges that he molested his granddaughter. Steighner was also concerned that if Jordan testified, the State would offer his daughter as a rebuttal witness. His daughter, the mother of the child he was accused of molesting in another county, was a "voracious opponent" of Jordan's, and would have presented damaging testimony not only about Jordan's sexual assault of his granddaughter, but also about the sexual

[2]It is obvious that Steighner was aware of the conviction and that a fair opportunity to contest its use was afforded to Jordan because Steighner filed a motion in limine that prevented the prosecution from introducing evidence of the conviction. The district court granted the motion in part, but noted that at some point the conviction might become relevant.

molestation she had suffered at the hands of Jordan. Steighner communicated all of these various concerns with Jordan in advising him not to testify.

Given that Steighner offered several valid reasons for his decision to advise Jordan against testifying, we conclude that the district court did not err in finding that Jordan's waiver of his constitutional right to testify was knowing and voluntary.

AFFIRMED.